In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-1001

KENNETH C. FITZGIBBON,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

The petitioner, Kenneth C. Fitzgibbon, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 19, 1978.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No Opinion was rendered by the District Court for the District of Colorado. The Opinion of the Court of Appeals is set forth in Appendix "A". The Judgment of the Court of Appeals is Appendix "B". The Judgment of the District Court is Appendix "C".

JURISDICTION

The Judgment of the Court of Appeals for the Tenth Circuit was filed on May 9, 1978. A timely Petition for Rehearing was filed and Denied on June 9, 1978. Mandate was spread on June 19, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Can an "exculpatory no" response to a Bank Secrecy Act inquiry on Customs Form 6059-B bottom an 18 U.S.C. §1001 conviction where Customs officials have not informed the person concerned of the simple consequences of an Affirmative Answer or told him that it was legal to bring more than $5,000 into the country so long as he filled out Customs Form 4790?
2. Does the Bank Secrecy Act, as construed and applied to individual travelers violate the Fifth Amendment?

STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 18, Section 1001.
2. United States Code, Title 31, Section 1101(a).
3. United States Constitution, Amendment V.

The pertinent text is set forth in Appendix D.

STATEMENT OF THE CASE

Fitzgibbon was convicted after a jury trial in the United States District Court for the District of Colorado of a violation of 18 U.S.C. §1001, making a false statement to a government official, sentenced to one year in custody and ordered to pay costs of defense.

Fitzgibbon, an American citizen, arrived at Denver International Airport on Western Airlines flight 485 from Calgary, Canada, on March 31, 1977.

Upon arrival at U.S. Customs, Fitzgibbon presented his customs "Declaration Form" 6059-B, which was given to him and filled out in flight, to Customs Inspector Lockhart. Question 10 on that form asks "Are you or anyone in your party carrying over $5,000.00 in coin, currency, or monetary instruments?" Fitzgibbon checked that answer "No".

The same question was put orally to Fitzgibbon. He again replied "No". Government's Exhibits 2, 3 and 4 show that the customs area is busy. Signs are on the wall which, if seen, might put one on inquiry about the reporting requirement.

In spite of Fitzgibbon having been the subject of a tip, the customs inspectors concerned denied recognizing him. Sensing that Fitzgibbon was nervous, the customs inspectors took him to a secondary search area where he was patted down and ordered to remove his boots. As he removed each boot, he took out a packet of Canadian currency and mumbled something about "investment." Approximately $9,800 Canadian dollars were found.

After having been read his "Miranda" rights, Fitzgibbon volunteered to Customs Agent H. R. King that: He got the money in Canada and that he wanted to avoid a "hassle" with the IRS because part of the money was not his. $5,410.72 was to go to Sam Tuttle, 1162 Briar Way, Fort Lee, New Jersey 07024. Fitzgibbon had an envelope on his person with such an address. (Government's Exhibit 5).

Even though there are posters with an American flag and the bold figures "$5,000"' on the wall, no one actually told Fitzgibbon about Customs Form 4790, or that it was quite legal to bring in more than $5,000 into this country so long as he filled out Form 4790. And, there is no indication Fitzgibbon actually knew of the reporting requirement of Form 4790 "Report of International Transportation of Currency or Monetary Instruments."

Fitzgibbon touched on the "exculpatory no" doctrine in his opening brief at page 21. The Court of Appeals did not discuss this issue.

After the Court of Appeals Judgment affirming Fitzgibbon's conviction was filed in the District Court,

Fitzgibbon moved to recall the mandate and suggested a rehearing en banc because of the apparent conflict between the Tenth Circuit's opinion in this case and the cases of *United States v. Schnaiderman,* 568 F.2d 1208 (5th Cir. 1978) and *United States v. Granda,* 565 F.2d 922 (5th Cir. 1978) which reached an opposite result on the same facts.

That motion was denied.

REASONS FOR GRANTING THE WRIT

1. THERE IS A SQUARE AND IRRECONCILABLE CONFLICT BETWEEN THE TENTH CIRCUIT IN THIS CASE AND THE FIFTH CIRCUIT IN SCHNAIDERMAN ON THE SAME MATTER OF FEDERAL LAW ON THE SAME FACTUAL CIRCUMSTANCES.

Fitzgibbon, *United States v. Schnaiderman,* 568 F.2d 1208 (5th Cir. 1978) and *United States v. Granda,* 565 F.2d 922 (5th Cir. 1978) share a common factual scenario. Each actor entered the United States with more than $5,000 on his person. Each answered "no" to the orally posed question as to whether or not they were carrying more than $5,000 in currency on their person. Each checked the box on Customs Declaration Form 6059-B "no" to the same question.

None were given Customs Form 4790 "Report of International Transportation of Currency or Monetary Instruments." None were informed of the consequences of a "yes" answer nor were they told that it was legal to bring in more than $5,000 so long as the Report Form 4790 was filled out. Each was convicted.

However, *Schnaiderman* and *Granda* had their convictions reversed because the evidence was insufficient as a "matter of law" 568 F.2d at 1213. This doctrine of the "exculpatory no" was applied in *Schnaiderman* and *Granda* but not in petitioner's case.

Since the Fifth Circuit followed the lead of the Second Circuit in *United States v. San Juan,* 545 F.2d 314 (2nd Cir. 1976) it is clear that the circuits are in conflict on what seems to be an increasingly busy area of the federal criminal law. These conflicts justify the grant of Certiorari to review the Judgment below because these are significant and recurring problems.

---

2. IF A MERE "EXCULPATORY NO" RESPONSE TO AN OTHERWISE UNEXPLAINED BANK SECRECY ACT QUESTION "ARE YOU CARRYING MORE THAN $5,000 IN CASH" IPSO FACTO IS PERMITTED TO BOTTOM A 18 U.S.C. §1001 CONVICTION, THEN AS CONSTRUED AND APPLIED, THIS PRACTICE WOULD VIOLATE AMENDMENT V. THIS COURT SHOULD REVIEW AND CORRECT A SIGNIFICANT FEDERAL PROBLEM.

The government's theory in this case is exactly the same as it was in *Schnaiderman:* the question on Form 6059-B put the travelers on notice that he must file a report on Form 4790. 568 F.2d 1208 (5th Cir. 1978); Brief of Appellee, page 8.

In both *Granda* and *Schnaiderman* the Fifth Circuit held that as a matter of law this theory was insufficient to prove beyond a reasonable doubt that the traveler was aware of the reporting requirement of 31 U.S.C. §1101.

Under both *Schnaiderman* and *Granda* standards an acknowledged awareness of United States "currency laws" is also too vague and unspecific to bottom a finding of the requisite specific intent required by 31 U.S.C. §1101. And, the "exculpatory no" exception to 18 U.S.C. §1001 applies to Form 6059-B, thus as a matter of law, no 18 U.S.C. §1001 conviction could stand.

Numerous federal courts of appeals have said that 18 U.S.C. §1001 was not intended to embrace oral, unsworn statements, unrelated to any claims of the declarant to a privilege from the United States or to a claim against the United States. *United States v. Bedore,* 455 F.2d 1109 (9th Cir. 1972) at 1111. Statements, while materially false, have been held to fall beyond the parameters of 18 U.S.C. §1001 when made to government agents in a purely investigative capacity. *United States v. Krause,* 507 F.2d 113 (5th Cir. 1975); *Paternostro v. United States,* 311 F.2d 298 (5th Cir. 1962) 302-303.

The government conceded at page 8 of its brief in the Tenth Circuit in this case that a prosecution under 31 U.S.C. §1101 would have been "futile" because petitioner could sucessfully claim that he never knew that there was such a thing as a Form 4790.

Therefore, the government's case must stand or fall on the applicabiilty of the "exculpatory no" exception to 18 U.S.C. §1001.

We repeat what *Schnaiderman* and *Granda* have said: that this defense does in fact apply here.

Indeed, if the "exculpatory no" defense is not allowed, the statute will violate Amendment V.

United States v. London, 550 F.2d 206 (5th Cir. 1977):

> "In construing a statute that will often come close to trenching on fifth amendment rights, one ought not punish concealments or false statements which fall short of constituting affirmative acts." 550 F.2d 211.
>
> "We have held, in enunciating the so-called 'exculpatory no' doctrine, that essentially negative answers to questions propounded by investigating government officers are not statements within the meaning of the second clause of §1001 in the absence of some affirmative, aggressive, or overt falsehood on the defendant's part." Op. cit., at 213.

Three circuits hew to this line: the Fifth, the Ninth, *United States v. Bedore,* 455 F.2d 1109, 1110-1111 (9th Cir. 1972) and the First, *Frasier v. United States,* 267 F.2d 62 (1st Cir. 1959), *United States v. Chevoor,* 526 F.2d 178 (1st Cir. 1975) notes 9, 10, 11.

Obviously, if as a matter of law, there is no 18 U.S.C. §1001 statement, there can be no conviction of uttering a false statement.

London makes it clear that uttering the "exculpatory no" does not violate 18 U.S.C. §1001, 550 F.2d at 213.

If this "exculpatory no" doctrine is eviscerated then the statute itself, as construed and applied, will require incriminatory statements in violation of

Amendment V. See *Leary v. United States,* 395 U.S. 6 (1968); *Haynes v. United States,* 390 U.S. 85 (1968); *Marchetti v. United States,* 390 U.S. 39 (1968) and *Grosso v. United States,* 390 U.S. 62 (1968).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Tenth Circuit.

Dated, July 14, 1978.

Respectfully submitted,

RICHARD S. HENDERSON,

Counsel for Petitioner.

(Appendices Follow)

Appendices

Appendix "A"

PUBLISH

United States Court of Appeals
Tenth Circuit

No. 77-1520

United States of America,
Plaintiff-Appellee,
vs.
Kenneth C. Fitzgibbon,
a/k/a Michael Coe,
Defendant-Appellant.

[Filed May 9, 1978]

Appeal from the United States District Court
For the District of Colorado
(D.C. No. 77-CR-107)

Richard S. Henderson, San Diego, California, for Defendant-Appellant.

Rod W. Snow, Assistant United States Attorney (Joseph F. Dolan, United States Attorney, with him on the Brief), Denver, Colorado, for Plaintiff-Appellee.

Before BARRETT, DOYLE and LOGAN, Circuit Judges.

LOGAN, Circuit Judge:

Kenneth C. Fitzgibbon appeals his conviction by a jury of knowingly and willfully making a false

statement in violation of 18 U.S.C. § 1001, in connection with bringing foreign currency through U. S. Customs.

On appeal the appellant makes a number of claims: the indictment was defective; he was charged under the wrong statute; the evidence was insufficient to support the verdict; he was the victim of an illegal search; the jury was improperly instructed; and the Act involved here is unconstitutional.

Defendant-appellant Fitzgibbon entered the United States at Denver on a flight from Calgary, Canada. Upon arrival at U. S. Customs Fitzgibbon tendered to the official on duty, Joseph Lockhart, the "Customs Declaration" Form 6059-B, which is given during flight to all passengers coming into the United States from abroad. A question on the form asks "Are you or anyone in your party carrying over $5,000.00 in coin, currency, or monetary instruments?" Fitzgibbon had checked a "no" answer to that question. The official asked Fitzgibbon that question again orally during his inspection, as is apparently done routinely. Fitzgibbon's answer again was "no."

Fitzgibbon had come under suspicion on a tip, the investigation of which showed he had purchased a ticket from Denver to Calgary, Canada, and a return on the same flight forty minutes later. He had in fact returned the following morning. Lockhart testified that he did not recognize Fitzgibbon's name or appearance as one for whom he was to watch, but noticed Fitzgibbon was hesitant in answering "no" to the question about money. He stated that he then

asked Fitzgibbon if he acquired anything in Canada and again the answer was "no." As Lockhart examined Fitzgibbon's baggage, his testimony was that the defendant appeared nervous. Lockhart then motioned to a supervisor for a secondary examination. Fitzgibbon was taken to a search room and, in the presence of another Customs official, Lockhart "padded down" Fitzgibbon as a safety precaution and requested that the defendant empty his pockets. In Fitzgibbon's wallet was a relatively small amount of Canadian and Mexican money. Lockhart asked Fitzgibbon if this was the only currency the defendant had on his person and Fitzgibbon answered "yes." Defendant was then asked to remove his boots. In doing so he mumbled something about "investment," and as he removed each boot he reached into it and pulled out a bundle of Canadian currency, amounting in total to approximately $9,800.00 Canadian (worth slightly more than that total in U. S. dollars).

Fitzgibbon was then read his Miranda rights and taken to another room where he volunteered to Customs Agent H. R. King that he had acquired the money in Canada and wanted to avoid a hassle with the United States Internal Revenue Service because part of the money was not his; he was to send $5,410.72 of the money to an attorney in New Jersey. The remainder he said he earned in doing some construction work on a home in Washington state belonging to a Canadian resident. Fitzgibbon produced a slip of Canadian hotel notepaper from an envelope with the figure 5410.72 written on it.

In questioning Fitzgibbon, Customs Agent King took down information contained on a Wisconsin driver's license produced by Fitzgibbon. At trial the Director of Driver Control for Wisconsin testified that the number on the license was fictitious. Another agent testified that he checked the address given on the license and was unable to find any such location.

The indictment in this case reads as follows:

> On or about March 31, 1977, at Denver, in the State and District of Colorado, KENNETH C. FITZGIBBON, also known as Michael Coe, did knowingly and willfully make a false statement and representation and make use of a document, to-wit: a Customs Declaration Form 6059-B, which contained a false statement and entry, to the effect that KENNETH C. FITZGIBBON, aka Michael Coe, did not possess more than $5,000 in currency when in fact Kenneth C Fitzgibbon, aka Michael Coe did possess approximately $10,000.00 in Canadian currency, such declaration or report being required by Title 31, United States Code, Section 1101, under the auspices of the United States Customs Service of the United States Department of Treasury, all in violation of Title 18, United States Code, Section 1001.

The statutory provision underlying the charge, 31 U.S.C. § 1101, states:

> . . . whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—
>
> (1) transports or causes to be transported monetary instruments—
>
> . . . .

> (B) to any place within the United States from or through any place outside the United States, . . .

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

31 U.S.C. § 1052(1) defines monetary instruments as:

> coin and currency of the United States, and in addition, such foreign coin and currencies, . . . as the Secretary may by regulation specify for the purposes of the provision of this chapter to which the regulation relates.

These provisions are implemented by regulations found in 31 C.F.R. § 103.23(a),[1] and C.F.R. § 103.11 defines the meaning of the term "currency" to include "[t]he coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. . . ."

We will consider appellant's contentions on appeal in the order in which they are presented in his brief.

1. Fitzgibbon claims the indictment is defective because it is not specific enough. The argument is somewhat difficult to follow but he seems to contend it should have used the term "monetary instruments" instead of "currency," should have stated specifically

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[1] 31 C.F.R. § 103.23(a) as applicable reads: "Each person who physically transports . . . currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion . . . into the United States from any place outside the United States shall make a report thereof . . . ."

that the report requirement encompasses Canadian currency, and should have cited specifically the regulation defining monetary instruments to include Canadian currency. Also he alleges the Customs form referred to is a "baggage declaration" and that is not a proper form.

We find no merit in these arguments. Fed.R.Crim.P. 7(c)(1) requires only a "plain, concise and definite written statement of the essential facts constituting the offense charged." The test of the sufficiency of the indictment has been stated many times in the cases, and is whether the indictment contains the elements of the offense charged and apprises the accused of the nature of the offense. A guilty verdict will not be set aside for mere technical defects unless it is apparent the defendant is prejudiced. United States v. Mason, 440 F.2d 1293, 1296 (10th Cir. 1971), *cert. denied,* 404 U.S. 883 (1971). The indictment here sufficiently apprises the defendant as to the nature of the offense. He is charged with knowingly and willfully making a false statement on a specific Form 6059-B, in violation of a specific statute. The statute creating the reporting duty is also cited. The date of the act constituting the violation is set forth, and the currency which was being carried is recited. The precise regulation need not be mentioned expressly. It was incumbent upon the government to prove beyond a reasonable doubt that defendant knowingly made the false statement, hence that he knew Canadian currency was within the intent of the reporting requirement. But it is not essential that the indictment do more than state that his carrying in of Canadian currency was a violation, in order to advise him of the charge.

As to the complaint that Customs Form 4790 is the proper form instead of the one recited in the indictment, we note that Form 6059-B was in normal use given to incoming passengers to ascertain whether a report on Form 4790 was required, and the defendant's only answer was on Form 6059-B, as charged.

2. We see no merit in appellant's argument that he should have been charged under 31 U.S.C. §§ 1058-59 and 31 C.F.R. 103.49 rather than under 18 U.S.C. § 1001. We recently dealt with a similar contention in United States v. Ready, No. 76-2050 (10th Cir., filed March 28, 1978) and held that which of two applicable statutes will be made the basis of an indictment is the decision of the government prosecutors.

Appellant contends, however, that in enacting §§ 1058-59 Congress intended to preempt prosecution under 18 U.S.C. § 1001. We are cited nothing to support the argument that Congress intended §§ 1058-59 to be the exclusive provisions available to prosecute Title 31 violators; in fact, 31 U.S.C. § 1052(k) suggests Congress contemplated prosecution under 18 U.S.C. § 1001 by reciting:

> For the purposes of § 1001 Title 18 the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

3. Did the evidence support a finding that defendant reasonably knew that Canadian currency was meant to be included in the reporting requirement? Here reliance is placed mostly upon the fact that the large posters in the passenger approaches to the terminal contain a picture of the American flag plus "$5,000," advising passengers to report negotiable instruments and currency over the amount of $5,000.

Certainly it is relevant whether defendant reasonably knew he should report Canadian money. The form did not expressly refer to Canadian or foreign currency. It did not, however, expressly refer to U. S. currency either, unless that is the required inference from use of the sign "$" before the figure "5,000.00." And if the Canadian currency is considered merely a commodity there is a further statement on the form as follows:

> In addition, the laws of the United States require that you declare ALL articles acquired abroad *whether worn or used, whether dutiable or not, and whether obtained by purchase, as a gift, or otherwise*) which are in your or your family's possession at the time of arrival. Furthermore, Repairs made abroad must also be declared.
>
> Nonresidents may make an oral declaration. Returning Residents may make an oral declaration if the total price of articles declared (*price actually paid or, if not purchased, fair retail price in country where obtained*) is not more than the sum of $100 per person. Otherwise You Must List In Writing On The Reverse Of This Form All Articles And Repairs Acquired Abroad Which You Are Now Bringing Through Customs. (See additional instructions on reverse.)
>
> All your baggage (including handbags and hand-carried parcels) may be examined. False Statements Made To A Customs Officer Are Punishable By Law. Consult "U. S. Customs Hints" and your inspector for full information.

We cannot read appellant's mind, so have to infer his knowledge of reporting requirements from his behavior and all of the facts in evidence. In this connection we do not have to rely upon the posters or even Form 6059-B which he signed. He made a statement from which it could reasonably be inferred he knew of the requirement when he said he wanted to avoid a hassle with the United States Internal Revenue Service. Further, the fact he carried the money in his boots rather than in his wallet or in his pockets supports the inference he was attempting to hide it. His possession of a false driver's license, and his "no" answers to repeated questions about whether he acquired anything in Canada and whether he had money would support the conclusion he knew of the reporting requirement.

As to the contention that he might have reasonably supposed his agency relationship as to part of the money would excuse the reporting, we need only read the precise wording of the question he answered "no."

It stated, "Are you or anyone in your party carrying over $5,000 in coin, currency or monetary instruments?" That clearly requires an agent or one acting

partly as agent, carrying such amounts as involved here, to give an affirmative reply.

4. It is asserted that the money was obtained in violation of defendant's Fourth Amendment rights against unreasonable searches. Obviously U. S. Customs inspectors make searches of the person and baggage of people entering the United States, as a part of their routine duties. It has been held that to conduct a strip search involving a serious invasion of a person's privacy the Customs official must have a "real suspicion" based upon "objective, articulable facts." United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970). The Circuit which formulated that standard has ruled against appellant's contention in a "boot" case. In United States v. Chase, 503 F.2d 571, 574, (9th Cir.), *cert. denied,* 420 U.S. 948 (1975), it was stated:

> Real suspicion should, therefore, limit searches only when there is a similar danger of embarrassment: where, in short, the suspect is forced to disrobe to a state which would be offensive to the average person. Judged by this standard, the removal of a boot is surely not a "strip." Rather, it is like one removing an overcoat or a suit jacket—relatively innocuous. . . .

The case before us is an easy one compared to *Chase.* There the party was required to remove other articles of clothing also, and yet the search was considered lawful. Here defendant was taken to an area where strip searches were made, but was asked only to remove his boots. While one inspector testified that he would not say whether the search might have

gone farther, there is no question but that it did stop with the boot removal. We hold that the search was lawful.

5. While we believe a cautionary instruction to the jury would have been warranted here as to the driver's license, none was requested. No complaint was made at the time about the jury instructions given by the judge, and defendant presented no additional suggestions that were rejected by the Court. We have reviewed the instructions given and believe they are not prejudicial and state the issues to be decided clearly enough. We find no "manifest injustice" which requires reversal. United States v. Hagen, 470 F.2d 110 (10th Cir. 1972), *cert. denied,* 412 U.S. 905 (1973); McMurray v. United States, 298 F.2d 619 (10th Cir. 1961), *cert. denied,* 369 U.S. 860 (1962).

6. Appellant contends that the portions of the Bank Secrecy Act, 84 Stat. 1114, involved here (31 U.S.C. §§ 1101-1105) violates his First, Fourth and Fifth Amendment rights and should be declared unconstitutional.

The contentions regarding the First and Fourth Amendments have been rejected by the U. S. Supreme Court in California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974) and United States v. Miller, 425 U.S. 435 (1976).

Fitzgibbon's Fifth Amendment objection is directed to the power of the government to compel persons crossing our national borders to file reports of information which might later be used as incrim-

inating evidence in a criminal prosecution. The constitutional issues raised by appellant here have been considered and resolved against appellant's position in United States v. San Juan, 405 F. Supp. 686 (D. Vt. 1975), *rev'd on other grounds,* (without discussion of these constitutional issues) 545 F.2d 314 (2d Cir. 1976). We do not here decide the constitutional questions raised because they are not properly before us. Fitzgibbon was convicted of filing a false statement, under 18 U.S.C. § 1001. The Supreme Court has held in several cases "that one who furnishes false information to the Government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself." United States v. Knox, 396 U.S. 77, 79 (1969).

Bryson v. United States, 396 U.S. 64, 72 (1969) stated the principle as follows:

> Notwithstanding the fact that the Government has proved the elements necessary for a conviction under § 1001, the petitioner would have us say that the invalidity of § 9(h) would provide a defense to his conviction. But after *Dennis* it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood. (Footnote omitted.)

See also Dennis v. United States, 384 U.S. 855 (1966); Leary v. United States, 544 F.2d 1266 (9th Cir. 1977) (false statement to U.S. Customs officials).

7. Finally, it is argued the trial was unfair, citing principally the fact that information about defendant's use of a false Wisconsin driver's license was allowed to be admitted. That evidence was proper for the purpose for which it was used. We have examined the entire record and find no merit in appellant's contention concerning an unfair trial.

AFFIRMED.

Appendix "B"

United States Court of Appeals
for the Tenth Circuit

No. 77-1520
(D.C. No. 77 CR 107)

May Term—May 9, 1978

Before The Honorable James E. Barrett, The Honorable William E. Doyle, The Honorable James K. Logan, Circuit Judges

United States of America,
Plaintiff-Appellee,
vs.
Kenneth C. Fitzgibbon,
Defendant-Appellant.

JUDGEMENT

This cause came on to be heard on the record on appeal from the United States District Court for the ..... District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is Affirmed. It is the further order of this court that Kenneth C. Fitzgibbon, a/k/a Michael Coe, appellant, shall, within ten (10) days from and after the date of the filing of the mandate

of this court in the district court, surrender himself to the custody of the United States Marshall for the District of Colorado in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons institution for service of sentence.

/s/ Howard K. Phillips,
Howard K. Phillips, Clerk

Appendix "C"

Date 6/10/77

Judge Alfred A. Arraj Deputy Clerk L. Bush Court Reporter Donna Spencer

CR No. 77-CR-107 United States vs. Kenneth Fitzgibbon

Counsel for:

Government Rod Snow

Defendant Kenneth Kubie

Ct. 1 1 Yrs.....Mos.....Days
Ct. 2.....Yrs.....Mos.....Days
Ct. 3.....Yrs.....Mos.....Days
Ct. 4.....Yrs.....Mos.....Days
Ct. 5.....Yrs.....Mos.....Days

To Run Consecutively with: .....

To Run Concurrently with: .....

( ) ORDERED that the maximum sentence having been imposed, deft. to become eligible for parole as provided under 18 U.S.C. 4203(a)(2).

( ) ORDERED that deft. be confined in jail type institution for ..... yrs. ..... mos. ..... days, and the execution of the remainder of sentence imposed be suspended and deft. placed on probation for a period of ..... yrs. ..... mos. ..... days.

( ) ORDERED that deft. be committed for treatment and supervision in lieu of a definite term pursuant to the F.Y.C.A., 18 U.S.C. 5010(b).

( ) ORDERED that Juvenile be [ ] committed [ ] placed on probation for a period not exceeding his minority pursuant to 18 U.S.C. 5034. (Fed. Juv. Del. Act).

( ) ORDERED that deft. be committed for Observation and Study for ..... days pursuant to: 18

USC 4203(b) ..... 18 USC 5010(e) ..... 18 USC 4252 (NARA).

( ) ORDERED that imposition of sentence suspended —Deft. placed on probation for ..... Yrs. ..... Mos. as to Cts. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

( ) Deft. found to be youth offender pursuant to USC 5010(a) (FYCA).

( ) ORDERED that defendant placed under supervision and probation dept. for ..... pursuant to 21 USC 844(b).

( ) ORDERED that deft. has violated probation and that Judgment and Order of Probation heretofore entered be set aside and revoked and judgment be entered herein.

( ) ORDERED that deft. pay a FINE of $..... on each of Cts. 1, 2, 3, 4, 5, 6, 7, 8.
TOTAL FINE of $..... ( ) Execution ( ) Commitment.

( ) ORDERED that deft. make RESTITUTION in in the amount of $.....

( ) ORDERED that Cts. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, ... be DISMISSED.

(x) Defendant advised of his right to appeal.

( ) ORDERED Bond on Appeal Set at $5,000 secured.

( ) ORDERED Bond continued pending Appeal.

(x) Deft. shall pay costs of his defense. Bond on appeal shall be secured bond.

Entered on the docket June 13, 1977

James R. Manspeaker, Clerk

Appendix "D"

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 749.

31 U.S.C. §1101. Reports

Persons required to file

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent of bailee, knowingly—

(1) transports or causs to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States.

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

Contents of filed report

(b) Reports required under this section shall be filed at such times and places, and may contain such of the following information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

Common carriers

(c) Subsection (a) of this section does not apply to any common carrier of passengers in respect to monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

Pub.L. 91-508, Title II, § 231, Oct. 26, 1970, 84 Stat. 1122.

UNITED STATES CONSTITUTION, AMENDMENT V

Amendment V—Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No. 78-100

In the Supreme Court of the United States

OCTOBER TERM, 1978

KENNETH C. FITZGIBBON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 576 F. 2d 279.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on May 9, 1978, and a petition for rehearing was denied on June 9, 1978. The petition for a writ of certiorari was filed on July 18, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted under 18 U.S.C. 1001 for making a materially false statement in the

course of routine administrative processing through customs.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of knowingly making a false statement in a material matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001.[1] He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that on March 31, 1977, petitioner, a United States citizen, arrived at the Denver airport on a flight from Canada (II R. 33-34). At the customs inspection area of the airport, posters advised incoming passengers of their duty to report any currency or negotiable instruments exceeding $5,000 in value (II R. 62). Petitioner handed Customs Inspector Lockhart his Customs Declaration Form 6059-B, on which petitioner had checked "no" in response to the question, "Are you or anyone in your party carrying over $5,000 in coin, currency, or monetary instruments?" (II R. 35-36; Gov't Exh. 1). Lockhart then followed routine administrative procedure by orally repeating that same question, and petitioner again made a negative response (II R. 36-37). Petitioner explained that he had only been in Canada overnight and had acquired nothing on his trip (II R. 37).

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[1]18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Noticing that petitioner was hesitant in his answer and appeared to be nervous, Lockhart decided to conduct a secondary examination in a separate room (II R. 38-39, 48). At Lockhart's request, petitioner emptied his pockets, which contained a relatively small amount of Mexican and Canadian currency (II R. 42). Petitioner then stated that he had no more money in his possession (II R. 43). Lockhart asked petitioner to remove his boots, and petitioner said either "You found my investment," or "There goes my investment" (II R. 43-44). Petitioner then produced two large bundles of Canadian currency from inside his boots (II R. 44-45). The value of this currency was slightly in excess of $10,000 in United States money (II R. 101).

After receiving *Miranda* warnings, petitioner told Customs Agent King that he had acquired the money in Canada, and that "he didn't want to have a hassle with the United States Internal Revenue Service for the reason that a portion of the money was not his, that he was to forward it to an individual in New Jersey" (II R. 55).

ARGUMENT

Petitioner contends (Pet. 5-9) that the false statements he made during routine customs processing into the United States fall within the "exculpatory 'no' " exception to 18 U.S.C. 1001 recognized by some courts. However, petitioner failed to raise this contention in the district court or in his brief and petition for rehearing in the court of appeals.[2] Since no exceptional circumstances justify

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[2]Although petitioner asserts (Pet. 4) that he "touched on" this argument in his opening brief in the court of appeals, the only reference to the "exculpatory 'no' " doctrine in that brief appears in a

raising the claim for the first time here, this Court should decline review. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

In any event, petitioner's contention is without merit. 18 U.S.C. 1001 had its origin in a statute enacted in 1863 "in the wake of a spate of frauds upon the Government." *United States* v. *Bramblett*, 348 U.S. 503, 504. The original statutory provision prohibited only those false claims that were intended to defraud the government of property. In 1934, however, the statute was broadened to embrace false and fraudulent statements regardless of whether any pecuniary loss to the government was involved. "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. 86, 93.[3]

quotation from *United States* v. *Beer*, 518 F. 2d 168, 171 (C.A. 5), cited as support for the proposition that materiality is an element of the crime under Section 1001 (Appellant's Br. 21). Petitioner did not then suggest that his response on the customs form was outside the purview of the statute by virtue of the "exculpatory 'no' " doctrine. It was only after the court of appeals denied his petition for rehearing on June 9, 1978, that petitioner raised this claim for the first time on June 25, 1978, in an untimely petition to recall the mandate and for rehearing *en banc*. See Fed. R. App. P. 35(c), 40, 41(a). In these circumstances, to consider petitioner's claim to have been properly raised below "would tend to encourage piecemeal litigation of claims of error in the appellate courts and undercut the policy of achieving prompt and final judgments." *United States* v. *Scallion*, 548 F. 2d 1168, 1174 (C.A. 5), certiorari denied, June 5, 1978, No. 76-6559.

[3]The 1948 revision of the Criminal Code merely put the statute in its present form without working any substantive change in its scope. See *United States* v. *Bramblett*, *supra*, 348 U.S. at 508.

Although the literal reach of the statute is quite broad, several courts have held, as a matter of statutory construction, that Section 1001 is inapplicable where a suspected criminal merely gives a false, but exculpatory, negative response (an "exculpatory 'no' ") to incriminatory inquiries of government agents acting in an investigative capacity. See, *e.g.*, *United States* v. *Krause*, 507 F. 2d 113, 117 (C.A. 5); *United States* v. *Bush*, 503 F. 2d 813, 815 (C.A. 5); *United States* v. *Lambert*, 501 F. 2d 943, 946 (C.A. 5) (*en banc*); *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5). Since the Fifth Amendment would prohibit the government from punishing a defendant for his mere refusal to make a self-incriminating statement in response to an investigative inquiry, the courts have been reluctant to assume that Congress meant to punish the defendant who has answered the question with a false exculpatory denial instead of silence. The "exculpatory 'no' " exception to Section 1001 is thus designed to protect the constitutional privilege against self-incrimination by limiting the potential for abuse that might arise if the false statement offense were used against the targets of criminal investigations. See, *e.g.*, *United States* v. *Bush*, *supra*, 503 F. 2d at 815; *United States* v. *Lambert*, *supra*, 501 F. 2d at 946 n. 4. See also *United States* v. *Chevoor*, 526 F. 2d 178, 183 (C.A. 1), certiorari denied, 425 U.S. 935.

In determining the contours of an "exculpatory 'no' " exception to the false statement offense, the courts have maintained a distinction between lies uttered in response to "administrative" inquiries and those proferred in an "investigatory" context. Since the "exculpatory 'no' " doctrine is thought to be justified by the need to avoid the "powerful impetus to inquisition as a method of criminal investigation" that 18 U.S.C. 1001 might otherwise supply, *United States* v. *Bush*, *supra*, 503 F. 2d at 815, the doctrine has been applied to investigative

inquiries or "to statements made to government agents acting in a purely 'police' capacity." *Ibid.* See also *United States* v. *Krause, supra,* 507 F. 2d at 117; *Paternostro* v. *United States, supra,* 311 F. 2d at 309.[4] Where the government employee is not investigating suspected criminal activity but is instead acting merely in an administrative capacity, however, the concern over inquisitorial procedures is not present. If the defendant has sought to obtain administrative approval for action involving governmental functions, his uttering of a false statement in response to routine administrative questioning is "far removed from the basic situation" in which the "exculpatory 'no' " doctrine would properly apply. *United States,* v. *Bush, supra,* 503 F. 2d at 818 n. 2.

The facts in this case do not present a situation in which the government has attempted to use 18 U.S.C. 1001 "to compel citizens to answer truthfully every question put to them in the course of a federal police or federal criminal investigation." *Id.* at 815. Instead, the petitioner was merely asked a standard question on a form

[4]In the brief filed by the United States in *Nunley* v. *United States,* 434 U.S. 962 (which we are sending to petitioner), we noted our agreement with the decisions of the courts of appeals that apply the "exculpatory 'no' " doctrine in the narrow context of false denials of guilt made by targets of criminal investigations. We stated there (p. 8) that the Department of Justice has adopted a policy requiring the approval of the appropriate Assistant Attorney General before any prosecution may be brought under 18 U.S.C. 1001 for false statements made to a federal investigator. In implementation of that policy, the Department ordinarily refuses permission to prosecute where the false statement is made during the context of a criminal investigation and essentially constitutes merely a denial of guilt. In adopting this policy, however, the United States does not acquiesce to extensions of the "exculpatory 'no' " doctrine into administrative contexts, or where the statement is an elaborate effort to mislead investigators, or where, as here, a truthful answer is not incriminating.

that is given to virtually all travelers upon entry to this country as part of routine administrative processing. The undisputed evidence reveals that at the time petitioner falsely completed the customs form, and orally affirmed his false response to the customs inspector, petitioner was not the subject of a criminal investigation.[5] Petitioner was seeking a necessary administrative approval for his entry into the country, and his false statements were designed for the purpose of concealing information that was relevant to that administrative process. The false statements made by petitioner in this case thus were not made in the investigatory context to which the "exculpatory 'no' " doctrine properly applies. See *United States* v. *Rose,* 570 F. 2d 1358, 1363-1364 (C.A. 9).

Perhaps more fundamentally, however, the question asked on the customs declaration form, and by the customs inspector, was not itself an incriminating one. It is not a crime to transport more than $5,000 into the United States; it is only a crime willfully to refuse to report that currency in excess of that value is being imported, 31 U.S.C. 1058, 1101(a). A truthful answer to the administrative inquiry would thus not have been incriminating—indeed, it would have been exculpatory since it would have led to compliance with the reporting requirement. The "exculpatory 'no' " doctrine accordingly has no application in a case such as this.

Nor was the government required to inform petitioner that he would not incriminate himself by telling the truth. See *United States* v. *Gomez Londono,* 553 F. 2d 805, 811

[5]Although petitioner had come under suspicion as a result of a tip, customs inspector Lockhart, who processed petitioner, did not recognize petitioner by name or description (Pet. App. ii).

(C.A. 2). The purpose of the "exculpatory 'no' " doctrine has never been to protect persons who lie to federal officers merely because they mistakenly believe it advantageous to do so. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72 (footnote omitted). See also *United States* v. *Wong*, 431 U.S. 174, 180.

Petitioner's assertion (Pet. 5-7) that the decision in this case conflicts with the Fifth Circuit's decision in *United States* v. *Schnaiderman*, 568 F. 2d 1208, is not well taken. In *Schnaiderman*, the defendant was prosecuted under 18 U.S.C. 1001 for falsely stating, in response to a customs inspector's question, that he was carrying less than $5,000. The court held that the "exculpatory 'no' " exception was applicable to the defendant's oral denial of the customs inspector's question. 568 F. 2d at 1212-1213. The court suggested, however, that it might have reached a different result if the defendant had been prosecuted for a false *written* statement on the customs declaration form. *Id.* at 1210 n. 4. In addition, the court emphasized that there was "no evidence" in that case that the defendant had knowledge of the reporting requirements of 31 U.S.C. 1058 and 1101 or that the defendant had "a knowing and willful intent to pervert the purpose of the Bank Secrecy Act." *Id.* at 1213.

Here, unlike the situation in *Schnaiderman*, petitioner's conviction under 18 U.S.C. 1001 is based in part upon his written response on the standard customs declaration form, which he tendered to the inspector. Moreover, in contrast to *Schnaiderman*, the court of appeals determined here that petitioner had knowledge of the reporting requirements (Pet. App. ix):

> He made a statement from which it could reasonably be inferred he knew of the requirement when he said he wanted to avoid a hassle with the United States Internal Revenue Service. Further, the fact he carried the money in his boots rather than in his wallet or in his pockets supports the inference he was attempting to hide it. His possession of a false driver's license, and his "no" answers to repeated questions about whether he acquired anything in Canada and whether he had money would support the conclusion he knew of the reporting requirement.

Beyond that, since petitioner did not raise his contentions concerning the "exculpatory 'no' " doctrine in the court of appeals (see p. 3 and n. 1, *supra*), that court has not addressed the issue. Thus it cannot be said that the decision below stands in conflict with *Schnaiderman*.[6]

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[6]We note, in addition, that petitioner's reliance (Pet. 5-7) on *United States* v. *Granda*, 565 F. 2d 922 (C.A. 5), and *United States* v. *San Juan*, 545 F. 2d 314 (C.A. 2), is misplaced. Neither *Granda* nor *San Juan* involved application of the "exculpatory 'no' " doctrine to a prosecution under 18 U.S.C. 1001. Rather, those cases involved convictions for violations of the reporting requirements of 31 U.S.C. 1101 and 1058. The courts held in those cases that there was insufficient evidence of the defendants' knowledge of the reporting requirements and of their specific intent to commit the offense. Here, on the other hand, petitioner has been convicted for making a false statement, not for failure to report, and here the court below has found sufficient evidence of petitioner's knowledge of the reporting requirements to support his conviction under Section 1001.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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